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IN THE

Supreme Court of the United States

October Term, 1925.

No. 713.

DAVID H. BLAIR,
COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

vs.

UNITED STATES, EX REL. G. THOMAS BIRKENSTOCK AND GERALD RONON, EXECUTORS OF THE LAST WILL OF MARGARET MURPHY, DECEASED,
Respondents.

BRIEF FOR RESPONDENTS.

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENTS.

Statement.

Counsel for the respondents understand from the Solicitor General that this case will be argued and submitted in behalf of the petitioner on the Brief for the Petitioner in Opposition to Motion to Affirm. We

accept and adopt the statement of the question and of the facts in that brief, with the single exception that in the restatement of the question at the top of page 5, the emphasis should be placed on the taxes having been "*erroneously * * * collected*" rather than illegally collected.

In that brief the petitioner concedes (1) that under the recent decision of this Court in *Girard Trust Company v. United States* (March 1, 1926), the decision of the court below that the interest is to be computed under the Revenue Act of 1924 (instead of under the Revenue Act of 1921 as originally contended by petitioner) should be affirmed, and (2) that the only point remaining undecided is one which was not raised in the petition for certiorari, viz.—just how to apply the provision that interest runs *from the date the tax was paid* in a case such as this where the overpayments were of part of a tax which was paid in four quarterly installments.

We submit that the Court of Appeals was right when it held as stated in its opinion—

> "We think also that the lower court was right in requiring that the increased interest should be computed equally upon the quarterly overpayments as of the dates when the respective installments of taxes were paid." (R. 17.)

and that its decision should therefore be affirmed without modification.

Summary of Argument.

I. The Revenue Act of 1924, allows interest in this case from the date of payment of the tax which was *erroneously* or illegally assessed or collected. The

statute in force at the time the present taxes were paid plainly contemplated that the amount by which each quarterly payment exceeded one-fourth of the correct tax was erroneously assessed or collected. If the assessment or collection was *erroneous* it is immaterial whether it was also illegal (the courts recognizing a clear distinction between the use of these two terms in this connection, *Ford v. McGregor*, 20 Nev. 446; *Clay County v. Brown*, 90 Ark. 413). In stating on page 7 of his brief that "The respondents contend * * * that of each installment paid, $8,763.72, was 'illegally collected,'" petitioner entirely mistates respondent's position, just as he utterly fails to meet the real issue when he submits, as the only point on the merits in his brief, that "There was no tax illegally collected before the amount of the correct tax had been paid."

II. The Revenue Act of 1924, has an express provision which, if then in effect, would have required the interest to be computed on the excess of each quarterly payment over one-fourth of the correct tax if the excess had been determined in time to have been credited against one of the final installments. There is nothing in the law to suggest that exactly the opposite principle should be applied when the excess is refunded instead of credited, and it is plain that the law contemplates that the same principle is to be followed in both instances. *It is clear that the statute contemplates that at least as much interest is allowable when an overpayment is refunded as when it is credited.*

ARGUMENT.

I. There was an erroneous overpayment and collection of $8,763.72 when the first installment of $22,239.23 was paid on April 13, 1920, and a similar erroneous overpayment and collection in the same amount when each of the other installments were paid.

The petitioner's whole argument centers around one single but constantly recurring theme, viz.—that no part of either of the first two installments of $22,239.23 were erroneously or illegally collected because in the aggregate they were less than the correct tax. But the utter fallacy of this argument is apparent when we refer to subdivisions (a) and (b) of Section 250 of the Revenue Act of 1918, 40 Stat. 1082 (which we quote more fully, and italicise rather differently, than did the Commissioner)—

> "(a) That except as otherwise provided in this section and sections 221 and 237 *the tax shall be paid in four installments, each consisting of one-fourth of the total amount of the tax.* The first installment shall be paid at the time fixed by law for filing the return, and the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after the time fixed by law for filing the return. Where an extension of time for filing a return is granted the time for payment of the first installment shall be postponed until the date of the expiration of the period of the extension, but the time for payment of the other installments shall not be postponed unless the Commissioner so provides in granting the extension. * * *
>
> (b) As soon as practicable after the return is

filed, the Commissioner shall examine it. *If it then appears that the correct amount of the tax is* greater or *less than that shown in the return, the installments shall be recomputed.* If the amount already paid exceeds that which should have been paid *on the basis of the installments as recomputed,* the *excess so paid* shall be credited against the subsequent installments; and if the amount already paid exceeds the correct amount of the tax, the excess shall be credited or refunded to the taxpayer in accordance with the provisions of section 252."

If the petitioner relies on these sections, as he seems to in his argument, how does he explain his persistent failure and refusal to comply with the express requirement of subdivision (b)—that the installments shall be recomputed by him when he examines the return? And how can he deny what he refers to as the respondents' contention "that each of the quarterly installments paid by the taxpayer should have been $13,475.51, instead of $22,239.23?"

The petitioner has found that the correct amount actually owed was $53,902.07, and so concedes on page 7 of his brief. Under the statute which has just been quoted and under which these taxes were collected, it inevitably follows that when the petitioner examined the return and found that the total tax should be only $53,902.07, he was required by law to recompute the installments at $13,475.52, $13,475.52, $13,475.52, and $13,475.51, respectively. Under the same statute it likewise follows that—to take the first installment as an illustration—only $13,475.52 was *due* on the installment date whereas $22,239.23 was collected. Thus under the very terms of the statute there was an erroneous collection of the excess of $8,763.71,

and that much of the total tax refunded must therefore be considered as having been erroneously paid on April 13, 1920, when the first excessive installment of $22,239.23 was paid.

The statute thus clearly established each one-fourth installment as the basis of payment, and expressly contemplated that there would be an overpayment "if the amount already paid exceeds that which should have been paid *on the basis of the installments as recomputed.*" This is a clear recognition in the statute that in such case the overpayment *of each installment* had been *erroneously* collected. The basis of petitioner's objection is thus swept away and it is obvious that the judgment of the court below, resting as it does "on the basis of the installments as recomputed" is correct.

II. Section 1019 of the Revenue Act of 1924, which applies to this case, expressly contemplates that interest shall be computed proportionately from the date of the payment of each installment.

The petitioner's whole argument, as well as our own argument up to this point, has been based entirely on the Revenue Act of 1918, under which these taxes were originally paid. But Section 1019 of the Revenue Act of 1924 (43 Stat. 346) is the statute which is to be construed and applied in this case, and if we turn to it we find there a provision which fully confirms the correctness of our position and of the decision of the court below. That section provides (italics ours)—

> "Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected, or of any penalty collected

without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per cent per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, *or in case of a credit, to the due date of the amount against which the credit is taken*, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

At the bottom of page 10 of his brief petitioner argues that if the taxpayer had discovered her mistake before paying the third installment and had then paid only the unpaid balance she would obviously not have been entitled to any interest on the amounts by which the installments paid exceeded one-fourth of the correct tax. If this conclusion is right then it might logically enough follow that his position in this case is sound, but by the same token, if this conclusion is wrong, then his own argument proves a boomerang and confirms our position and that of the lower court. And that it is wrong can readily be shown.

At the time the present taxes were collected and paid there was no provision for any interest of any sort on either refunds or credits, the interest here in question being provided for by Section 1019 of the later Revenue Act of 1924, which is the statute to be construed in this case. Section 270 of that Act (43 Stat. 295), provides that the quarterly installments of taxes unpaid by it shall be due on the same dates as under the earlier Acts, and Section 272 of that Act (43 Stat. 296), similarly provides—

> "If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the excess shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

Bearing in mind that this is substantially the same as the provision of Section 250 (b) of the Act of 1918, under which an excess of an earlier installment might be credited against a later installment, we find that Section 1019 provides for interest in just such a case. It provides expressly that interest shall be paid—

> "in case of a credit, to the *due date* of the amount against which the credit is taken."

To apply this to the facts of this case. Let us take the very illustration suggested in the petitioner's brief and assume that on July 1, 1920, the Commissioner examined the return and found that the tax should have been only the same $53,902.07 which he later determined. Under Section 250 (b) of the Act of 1918, he would then have determined "the amount already paid" in excess of "that which should have been paid on the basis of installments as recomputed" (*i. e.*, $8,763.71 overpaid on April 13 and $8,763.71 overpaid on June 10), and would have credited $13,475.52 against the installment of that amount *due* on September 15, and the balance of $4,051.90 against the installment *due* on December 15. And if Section 1019 had been in effect its express provisions would have required the allowance of interest on $8,763.71 from

April 13, and on $4,711.81 from June 10, in both cases to September 15, the *due date* of the installment against which it was credited, and in the same way on $4,051.90 from June 10, to December 15.

It thus appears beyond possibility of question that Section 1019 contemplates the allowance of interest on the excess payment of each installment from the date when the installment was paid—which is exactly what we claim and what both of the two courts below decided. And as Section 1019 is the statute which is here for construction and upon which this case turns, it is submitted that the ruling of the court below was correct and should be affirmed without modification.

Respectfully submitted,

JAMES CRAIG PEACOCK,
JOHN W. TOWNSEND,
Counsel for Respondents.

April, 1926.